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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 589.

WILLIAM JACOB,

Petitioner,

against

THE CITY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

SILAS B. AXTELL,
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DOMINICK BLASI,
of Counsel.

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BRIEF ON BEHALF OF PETITIONER.

Statement.

This case comes before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review that part of the decree which affirmed a judgment of dismissal of the District Court for the Southern District of New York. The petition for the writ of

certiorari was filed September 6, 1941, and certiorari was granted by this Court on October 13, 1941.

The dismissal and affirmance of the main count set forth in the complaint was a cause of action for damages resulting from personal injuries suffered by a seaman on board a ship, during the course of his work. The second and minor count, a cause of action for maintenance and cure, was reversed.

No written opinion was filed in the District Court. The colloquy on the motion to dismiss, remarks to the jury, and rulings appear at pages 31 to 42 of the record.

The per curiam opinion of the Circuit Court of Appeals, 118 Fed. (2) 800, appears in the record at pages 44 to 46.

The jurisdiction of this Court rests on Section 240 a of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347 [a]).

Facts.

Jacob was employed as a water tender, on the City of New York's ferryboat, "Dongan Hills", and was injured on the 4th day of October, 1938, while in navigable water of the United States at the Port of New York. On the date in question, as set forth in the pleadings, Mr. Jacob was changing oil strainers, when suddenly the wrench that he was using slipped, and petitioner was caused to be precipitated from and fall off a platform, striking and landing on a catwalk or grating, whereby he sustained the injuries sued for (R., 9). The process of changing the oil strainers was by taking one strainer out and putting another one in—by the head of a manifold (R., 11), this manifold being a device that contains more than one strainer. To take the strainer off it is necessary to take off six bolts. The individual performing the service was required to stand on an 18" square, stationary platform (R., 11).

The manner of the happening of the accident is briefly thus:

> "Q. What happened? A. In taking off these bolts and putting them on they have to be very tight, and I put a strain on them and the wrench slipped and I had nothing to grab and I fell and hit an angle iron" (R., 12).

The wrench which was being used "was well worn." "It had seen a lot of service. It had a lot of play on it" (R., 12).

In inquiring about the wrench, the trial Court was given the following testimony (R., 13-14-15):

> "The Court: Was there anything wrong with the wrench except at the end?
> The Witness: It was very loose.
> The Court: A loose fit?
> The Witness: Yes, sir.
>
> Q. Was there any other wrench on the boat that would fit the stud? A. Not that I know of.
> Q. Did you make inquiries to get a better or another wrench? A. I did.
> Q. From whom? A. The chief engineer.
> Q. Did you show him the wrench you had been using? A. No. I told him the wrench I had was very bad.
> Q. What did you tell him exactly? A. I told him I would like to have a new wrench.
> Q. What did he say? A. He said for me to look in the tool closet and see if there was one in there; and I went up there and couldn't find any and I believe he said he sent an order out for me.
> Q. How long before that, before the accident, did you report that? A. I guess two or three days before.

The Court: Had the wrench been slipping before that?

The Witness: Yes, she was.

Q. Where were the tools kept on this ship? A. In the engine room.

Q. Was there a place for them? A. There was a tool locker there.

Q. What do they call it? A. A tool locker.

* * * * * * *

Q. It was just a place where tools were supposed to be put when not in use? A. Yes, sir.

Q. You looked over all they had there? A. I did.

Q. You found no end wrench? A. That is right."

This is additional testimony as to the defectiveness of the wrench (R., 16):

"Q. I want you to take this open end wrench and just show the jury, using that to illustrate with, what you say was the matter with the other wrench? A. There was play in the jaws; it was worn.

* * * * * * *

Q. And what happened? A. It slipped.

Q. When it slipped what happened to you? A. I lost my balance and went off the platform and found myself in the passageway.

Q. What did you strike against? A. An angle iron."

The plaintiff was severely injured (R., 17), and has had constant pain of his whole side, with difficulty in breathing (R., 18-20). Several ribs were fractured (R., 7-31).

Petitioner on cross examination gave the following testimony:

"Q. On this day he (chief engineer) had a whole set of tools and wrenches, didn't he? A. No.

Q. Did you look in his tools? A. I did.

Q. And you didn't find any wrenches? A. Not one to fit.

* * * * * *

Q. He had adjustable wrenches, end wrenches, adjustable ones? A. No, he didn't.

Q. You don't know about that? A. No, he didn't have that; they didn't come on the boat" (R., 23).

Petitioner was cautious in the manner of performing his work. The nuts having required tightening Jacob braced himself when he placed the strain on the wrench. He did his work according to the course of experience—20 years (R., 26).

Proof of general custom, usage and practice, with regard to the supply of tools, wrenches, etc., was offered but the Court refused to allow it (R., 30).

On motion of the respondent that petitioner failed to offer proof and to introduce evidence sufficient to constitute a cause of action (R., 31), a motion was granted with an exception to petitioner, the Court holding that under the "simple tool doctrine" plaintiff could not succeed, and its authority for the ruling was the case of *Newbern* v. *Great Atlantic & Pacific Tea Company*, 68 Fed. (2d) 523 (R., 32).

The Court did not find that the petitioner gave any false testimony, nor was there any such suggestion. It was accepted as true.

The testimony given by petitioner was not contradicted. He stated that the superintendent was told that he would order another wrench but it was never done. Jacob's superior officer knew the one in use to be worn (R., 14). The request was made three times, "2 or 3 days before" (R., 14, 27). A socket wrench "could be used very handy" (R., 22) but there was none on board. What was needed and should have been provided was not done (R., 27).

The Circuit Court in affirming the ruling of the District Court overruled petitioner who endeavored to show that the respondent should have supplied a better and different tool.

The trial Court erred (R., 30) in refusing to permit the plaintiff to prove the difference between the type of wrench he was using and a proper one (R., 30). The trial Court should have submitted to the jury under the circumstances the issue of whether the respondent had exercised that degree of care required of it by law to furnish the employee with reasonably safe tools and equipment and a proper place to work.

The Circuit Court and the trial Court have both erroneously applied the so-called "simple tool doctrine" to a maritime tort and the former has erred in ruling "that the master has been guilty of no negligence with respect to the tool used by the employee" (R., 45).

The Decisions Appealed From.

Petitioner's action was brought under Sec. 33 of the Merchant Marine Act of 1920, Title 46, United States Code Annotated, Sec. 688 (commonly known as the Jones Act), which incorporated by reference the Railroad Employers' Liability Act, Title 45, United States Code Annotated, Secs. 51 to 59, to recover damages for personal injuries (first count), and maintenance and cure (second count). Petitioner was injured in the course of his work.

The case was tried in the District Court before the Honorable Isaac M. Meekins, District Judge, and a jury (petitioner having proceeded at law and demanded a jury trial pursuant to Rule 38 of the Rules of Civil Procedure for the District Courts), on February 29, 1940 and March 1, 1940. The Court upon petitioner resting his case entertained motions to dismiss the complaint. The motions were granted and the complaint dismissed (R., 31-42). Exceptions in both instances were allowed (R., 31-42).

The trial Court did not hear nor did the respondent present any proof or evidence (R., 31-42). The trial Court disposed of the issues on the merits and the Circuit Court of Appeals rendered its decision as aforesaid on petitioner's evidence alone.

The District Court refused to have the jury pass upon the facts and to determine them, but ruled on them itself, as a matter of law (R., 31-42).

The Circuit Court of Appeals rendered a per curiam opinion, 119 Fed. (2) 800. The Circuit Court sustained the District Court on the first count, i. e., the count for the damages for the personal injuries and reversed the count for maintenance and cure, with a direction that judgment on the latter count be entered for the amount offered by respondent in the District Court.

The entire matter was disposed of, and the Circuit Court found the facts against petitioner, holding as did the trial Court, that Jacob as a matter of law, could not have a recovery.

The Circuit Court in announcing and applying to the facts so found made a ruling as to the law, which, it is submitted was erroneous. Petitioner has been allowed a review of that ruling by this Court.

The Questions Presented.

Stated in broad terms, the questions are:

First—Whether a shipowner may have the benefit of the so-called "simple tool doctrine", heretofore unknown to the law of the sea, and the shipowner thus relieved of liability for personal injuries suffered by a seaman injured in the course of his employment while using a worn and only appliance available, where the shipowner has failed to provide a safe and proper appliance.

Second—Contrary to the evidence the Court below stated that petitioner had available for use, a proper appliance. Assuming that be so, the further question is whether the rule of comparative negligence, rather than that of assumption of risk applies to the seaman who has made use of a defective appliance, where a safe one is available.

Socony-Vacuum v. *Smith*, 305 U. S. 424.

Third—Whether a trial Court may exclude evidence of custom and practice as to the proper tools that should be supplied by a shipowner to seamen.

POINT I.

The "simple tool doctrine" is not applicable to seamen. The Jones Act, which incorporates by reference the Railway Servants Act, provides that it is a shipowner's duty to furnish a seaman with a seaworthy vessel, and safe and proper appliances and tools.

The statute is not permissive but mandatory upon an employer to furnish proper tools and appliances (Railway Servants' Act, Sec. 51, Title 45, U. S. C. A., incorporated by reference in the Jones Act). It provides that every employer

> "* * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * appliances, machinery * * * or other equipment."*

A shipowner is obliged to provide its employees with a seaworthy vessel and with proper gear, appliances, equipment, devices and tools. The statute (Jones Act) applies to it as well as a carrier by rail.

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*The full text of the Jones Act and Railway Servants' Act are in the appendix on pages 19 and 20.

Sec. 688, Title 46, U. S. C. A. (Jones Act);
Sec. 51, Title 46, U. S. C. A. (Railway Servants Act);
Panama v. *Johnson*, 264 U. S. 375;
Pacific v. *Peterson*, 278 U. S. 130;
Socony-Vacuum v. *Smith*, 305 U. S. 424.

The evidence is clear and uncontradicted that the wrench was worn and defective (R., 12-13) and there was "not one to fit" available (R., 23).

Jacob being a seaman and entitled to the benefits of the Jones Act, should not have been deprived of his right to a jury trial. The Courts below should have applied the law applicable to this case, rather than a rule unknown or inapplicable to maritime torts.

In *The Seeandbee*, 102 Fed. (2d) 577, the Court, at page 581, ruled:

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and this does not depend on the exercise of reasonable care, but is absolute. *H. A. Scandrett*, 2 Cir., 1937 A. M. C. 326, 87 F. (2d) 708."

In *Zinnel* v. *Fleet Corp.*, 10 Fed. (2d) 47, a dismissal in a law action in which the shipowner was charged with failure to provide a rope for decedent's safety was reversed and it was held:

> "* * * All we need, and do, hold is that under the law of master and servant, as now in force by statute, the circumstances were such as would allow the jury to find that there was no rope, and that its absence, made the intestate's place of work unsafe" (pp. 48 and 49).

Such was the situation herein. Respondent neglected to furnish Jacob with a suitable and proper wrench, as re-

quired. Petitioner's place of work was thereby rendered unsafe.

A shipowner warrants the seaworthiness of the vessel, and is obliged to provide the seaman with safe equipment, and this is implied in and is a part of the contract of employment. That is the law of the sea.

> *Rainey* v. *New York and Porto Rico Steamship Co.*, 216 Fed. 449;
> *Storgard* v. *France*, 263 Fed. 545, certiorari denied 252 U. S. 704.

The Jones Act gave additional remedies and increased the seaman's rights under the settled maritime law.

There has been no legislative enactment to modify or nullify this obligation of the shipowner to provide safe and suitable equipment and tools for the seaman's work, rather this Court has made clear that a shipowner failing to comply with its non-delegable duty must respond in damages to the injured employee:

> *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367;
> *Eugel* v. *Davenport*, 271 U. S. 33;
> *Socony-Vacuum* v. *Smith* (supra);
> *Pacific* v. *Peterson* (supra).

In the *Rainey* v. *New York and P. R. S. S. Co.* case (supra), the rule was enunciated as follows:

> "According to the general maritime law, there was an implied warranty on the part of the shipowner that the ship in question was seaworthy at the time of beginning the voyage in question" (p. 453).

It was satisfactorily established by petitioner that a safe and suitable wrench was not on the vessel for his use.

The trial Court should have submitted the issues to the jury; and the Circuit Court should have reversed the dismissal.

Crickett v. *Parry*, 263 Fed. 523, certiorari denied 252 U. S. 580;
U. S. S. B. v. *O'Shea*, 5 Fed. (2d) 123;
Storgard v. *France*, 263 Fed. 545;
Grimberg v. *Admiral Oriental Line*, 300 Fed. 619;
Ives v. *United States*, 58 Fed. (2d) 201;
Zinnel v. *Fleet Corporation*, 10 Fed. (2d) 47;
Stevens v. *O'Brien Co.*, 62 Fed. (2d) 632.

The cause of Jacob's injuries was respondent's failure to supply and keep the vessel equipped with sufficient and proper tools, and it was for the jury to determine the issue of negligence, not the trial Court, petitioner having duly sued under the Jones Act and demanded a jury trial, as permitted by the rules (supra).

This case is no different than the numerous cases that have been decided by the Courts in which it has been universally held that a shipowner is liable for failure to provide a rope, ladder, door hook, socket wrench, etc. The doctrine of simple tool is applicable to cases where an employer furnishes a tool which is defective in its manufacture or construction, such as an improperly tempered chisel which splinters or a bolt or a water glass that breaks because of inherent defect, and in such cases the courts hold and rightfully so that the employer, having made every reasonable effort to provide proper appliances, cannot be held liable for the inherent or latent defect of the instrument, but cases are lacking in which the simple tool doctrine has been held to apply to instruments which have become worn out and no longer fit for use or which was not the type or kind for the employee to use which should be removed from the vessel and replaced with new or better ones. The worn out wrench should have been replaced with a new, or better suitable

one. Respondent had ample time to do so—"two or three days" (R., 14). The petitioner does not, and did not below, contend that the instrument furnished him was inherently defective or improperly manufactured. He proved it was worn and unfit for use. There was no chipping or breaking. The slipping was due to its age, wear and tear, and also because it was the wrong kind of wrench for that purpose. The case would be no different were the petitioner to have furnished any other instrument resembling a wrench, but unfit for the purposes intended in the performance of Jacob's duties. Furthermore, Jacob had no choice of selecting a good wrench from a bad one, there having been no others available (R., 23-27). The rule requiring shipowners to furnish proper tools should not be relaxed. The employer should be held to the requirements, to exercise due care to furnish the necessary and safe tools.

A case similar to the one at bar is that of *Coast Steamship* v. *Brady*, 8 Fed. (2) 16, cert. denied 269 U. S. 578. It appears that a seaman was allowed a recovery by reason of the defendant's failure to provide a proper wrench. The Circuit Court of Appeals for the Fifth Circuit affirmed the award because, as it observed, at page 18:

> "Witnesses for the plaintiff and defendants agree that the ordinary barrel or socket wrenches are the kind which were suitable for the work being done on the occasion of plaintiff's injury, and that there were none on board of the necessary size."

And as further stated by it, at pages 18 and 19:

> "It has been held by the Supreme Court that the Merchant Marine Act (41 Stat. 988) is constitutional, and that the Employers' Liability Act (Comp. St. 8657-8665) which renders carriers by railroad liable to employees for injuries resulting by reason of *any*

defect or insufficiency in equipment, including appliances, was made applicable to steamships by the Merchant Marine Act as amended. *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.

* * * * * *

The danger of the risk was a question of fact, to be determined by the jury. It is immaterial that the wrench used was a simple tool, as the suit is not based upon any defect or unfitness for the purposes for which the wrench was designed. In order to establish liability for negligence, it is sufficient if it appears that injury is a natural and probable consequence of the breach of duty. It is not necessary that the party at fault should have contemplated or anticipated that his negligence would cause the particular kind of injury which resulted; but a person guilty of negligence is liable for 'all consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not), would, at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind.' I Sherman & Redfield on Negligence (6th Ed., Section 29)." (Italics ours.)

In *Howarth* v. *Shipping Board*, 24 Fed. (2d) 374, the facts were briefly, that a door hook was broken off and a fire brick was used in its place to hold the door from which the said hook had been broken off. In reversing the judgment of dismissal and ordering the case back for a new trial, it was held (p. 376):

"It is argued that the fire brick was a safe door stop, and had worked well enough before; but a different inference may be drawn, and a jury ought to have been allowed to say whether the defendant should

have maintained a hook on the door to hold it securely back, or whether the brick provided in place of the missing hook was a reasonably safe appliance, in view of the tendency of ships to pitch and roll in rough weather. The dismissal of the cause of action to recover indemnity was error. If the door without the hook was unsafe, the *acts of defendants in furnishing an unsafe appliance would be negligence.* The Merchant Marine Act of 1920 allows recovery for negligence. 41 U. S. Stat. at Large, page 1007 (46 U. S. C. A., Sec. 688 [Comp. St., Sec. 8337a])." (Italics ours.)

In the case of *Ives* v. *United States*, 58 Fed. (2d) 201, a decree of dismissal in admiralty was reversed and a recovery allowed. Ives was engaged as a fireman on a voyage between New York and Norfolk. One of the ventilators could not be turned, and a pipe was being used in an effort to do so; it slipped off the handle, sprang back due to the fact that torsion had been exerted on the reach rod, striking appellant's eye. The Court held that:

> "With a reach rod as long as this, it should have been foreseen by the appellant's superior that the use of the pipe as described would cause a spring and incur the danger of a torsion of the rod. The leverage with the push and pull thereon would cause it. *The non-delegable duty to use due and reasonable care to make and keep the ship seaworthy, as well as her appliances, was upon the owners during the voyage.*" (Italics ours.)

In the case of *Storgard* v. *France* (supra) Judge Ward, speaking for a unanimous bench in reversing the judgment obtained by the defendant in the trial Court, stated the issue was:

> "The charge of negligence was that the owner permitted the bolt to become worn and defective, so that

the vessel was unseaworthy as to him. It will not be necessary to go into particulars, because the jury found a verdict for the defendant, and the only question to be decided is whether the court erred in charging them" (p. 546).

And held (p. 547):

"If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen. The evidence was that the sailors always used this ring on their way to the topmast. The seamen were bound to use the equipment and appliances which the owners furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which ought to be known."

In *Helmke* v. *United States*, 8 Fed. Supp. 521, Judge Borah in an admiralty action awarded a seaman damages by reason of the shipowner's neglect in failing to maintain a chain railing reasonably safe. A dog ran between the seaman's legs and threw him off balance, and Helmke in an effort to steady himself grabbed the railing which gave way beneath his weight. In making the award, the trial Court followed the well known rule that:

"The *respondent was obligated to provide reasonably safe equipment* for the libelant and I think it was a breach of that duty to him to fail to keep this chain railing reasonably safe for him and his fellow employees. When either through fault of the dog or otherwise the libelant lost his balance and involuntarily stumbled in the direction of and against the chain railing, *he would have been uninjured except for the negligence in failing to keep the chain railing safe.* There was no reason to suspect danger in allowing the

dog on board ship or even in playing with him, and it was the natural and probable consequence of *the negligent and wrongful failure to maintain a safe chain railing, that ought to have been foreseen in the light of the attending circumstances, that was the proximate cause of the injury*" (p. 522). (Italics ours.)

In the recent case of *McCarthy* v. *Palmer*, 113 Fed. (2d) 721, in which the defense of the simple tool doctrine was urged. The facts were briefly: A brakeman was injured while attempting to alight from a caboose when he slipped on a worn burlap rag nailed to the platform for a mat. The caboose was held to be defective, and the simple tool doctrine was not allowed. In rendering its opinion the Appellate Court held:

"The appellants contend that they are not guilty of any actionable negligence because of the condition of the bag tacked to the platform on the theory that the so-called simple tool doctrine, exemplified by such decisions as Newbern v. Great Atlantic & Pacific Tea Company, 4 Cir., 68 F. 2d 523, 91 A. L. R. 781, controls. That, however, fails to give adequate effect to the fact that the caboose was one of the cars the appellants were operating and that *its platform was defective because of the presence of the mat in its worn condition. That made the caboose a defective car.* It is true that the removal of the torn bag would have done away with the defect and that that would have been a simple thing to do but the ease with which the car would have been put into suitable condition for use does not alter the fact that it was actually defective due to the negligence of appellants or the fact that such negligence was the proximate cause of the plaintiff's injuries. If it does anything, it emphasizes that negligence." (Italics ours.)

POINT II.

The Circuit Court committed error in failing to follow and abide by the ruling of this Court in Socony-Vacuum v. Smith, 305 U. S. 424.

The Circuit Court stated that petitioner had a choice of tools. Assuming that he did have such choice, it should have under the circumstances reversed the dismissal and ruled as did this Court in *Socony-Vacuum Oil Company, Inc.* v. *Herbert A. Smith, Jr.* (supra), wherein the rule was definitely and clearly enunciated to be:

> "We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury".

These cases are quite similar. In the above case a loose step was involved and in the case at bar it was a loose wrench.

In the case of *Wong Bar* v. *Suburban Petroleum Transport, Inc.*, 119 Fed. (2) 745, the injured seaman while leaving the vessel chose a short ladder, although a longer one was available, and the Circuit Court of Appeals in reversing a judgment of dismissal and remanding the case for a new trial, made the following ruling:

"The appellee further urges that the plaintiff assumed the risk due to his choice of the shorter ladder. The choice of a defective appliance when a more appropriate one is available does not render assumption of risk a defense under the Jones Act when the plaintiff is on duty. Socony-Vacuum Co. v. Smith, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265."

POINT III.

A seaman should not be precluded from submitting evidence of custom and practice, as to what are proper tools that should be supplied by a shipowner.

The Court having decided that the doctrine of simple tool applied, it excluded custom evidence. This was error. It is well settled that a plaintiff should not be prevented from so doing.

Maibrunn v. *Hamburg American Line*, 77 Fed. (2d) 304;
Standard Oil Co. v. *De Vries*, 3 Fed. (2d) 852.

CONCLUSION.

The judgment of the Circuit Court of Appeals and of the District Court should be reversed and the case remanded with instructions that a new trial be given petitioner, and the jury be allowed to assess the damages suffered by him.

Respectfully submitted,

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APPENDIX.

Sec. 688, Title 46, U. S. C. A.—The Merchant Marine Act, known as the Jones Act, reads as follows:

"Section 688. Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007.)

The Railway Servants' Act, Title 45, U. S. C. A., Sec. 51, reads thus:

"Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any

foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65.)